

## EFFECTIVE DATE OF 1984 AMENDMENTS

### Digests

Updated Citations: Dorris v. California Cartage Co., 17 BRBS 218 (1985), aff'd sub nom. Dorris v. Director, OWCP, 808 F.2d 1362, 19 BRBS 82 (CRT) (9th Cir. 1987).

Cefaratti v. Mike Fink, Inc., 17 BRBS 95 (1985), aff'd mem., 785 F.2d 309 (6th Cir. 1986).

Neither present nor retroactive application of the voluntary retiree provisions enacted by the 1984 Amendments violates the Due Process clause of the 5th Amendment of the United States Constitution. Shaw v. Bath Iron Works Corp., 22 BRBS 73 (1989).

A pending petition for modification alone is not a claim "pending" for purposes of application of the 1984 Amendments. The claim must actually be reopened under Section 22, or else the claim must be considered to have been finally adjudicated once the original decision became final. Here, the modification petition was based on a change in law and thus, proper grounds for reopening the claim under Section 22 were not shown. The original Decision and Order became final in 1982, and the fact that this modification petition was filed prior to the 1984 Amendments did not make the claim "pending" within the meaning of the Amendments. McDonald v. Todd Shipyards Corp., 21 BRBS 184 (1988), rev'd sub nom. McDonald v. Director, OWCP, 897 F.2d 1510, 23 BRBS 56 (CRT) (9th Cir. 1990).

Where a Section 22 modification petition was pending on the effective date of the 1984 Amendments, the Ninth Circuit concludes that the 1984 Amendments apply to that motion and remands the case for recalculation of claimant's benefits in accordance with the amended Act. McDonald v. Director, OWCP, 897 F.2d 1510, 23 BRBS 56 (CRT) (9th Cir. 1990), rev'g McDonald v. Todd Shipyards Corp., 21 BRBS 184 (1988).

The amended version of Section 2(3) of the Act does not apply in a case involving an injury occurring prior to September 28, 1984. Bazemore v. Hardaway Constructors, Inc., 20 BRBS 23 (1987). Accord Williams v. Newport News Shipbuilding & Dry Dock Co., 28 BRBS 42 (1994) vacated mem. on other grounds, No. 94-1427 (4th Cir. Feb. 3, 1995); Barnard v. Zapata Haynie Corp., 23 BRBS 267 (1990), aff'd, 933 F.2d 256, 24 BRBS 160 (CRT) (4th Cir. 1991); Bergquist v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 131 (1989) (amendment applicable to an injury occurring after September 28, 1984).

Date-4

In a case involving an individual who was exposed to asbestos while working for the U.S. Navy, the court holds that Section 5(b) of the Act as amended in 1972 does not allow a manufacturer of asbestos to bring a contribution action against the U.S. in its capacity of

vessel owner. The court noted that, in any event, Section 5(b) as amended in 1984 no longer permits an employee to sue his employer in its capacity of vessel owner. Eagle-Pitcher Industries, Inc. v. U.S., 846 F.2d 888 (3d Cir. 1988), cert. denied, 488 U.S. 965 (1988).

Pursuant to the 1984 Amendments to Section 6 of the Act and Section 28(a) of the Amendments, the \$70 per week maximum limit on compensation contained in the pre-1972 Act is not applicable in pending cases. MacLeod v. Bethlehem Steel Corp., 20 BRBS 234 (1988); Nooner v. National Steel & Shipbuilding Co., 19 BRBS 43, 44-45 (1986).

Amended Section 6(b)(1) applies to all pending claims except for death benefits claims. In death benefits cases, amended Section 6(b)(1) applies only to death benefit claims where the employee died after the date of enactment of the 1984 Amendments. Nooner v. National Steel & Shipbuilding Co., 19 BRBS 43 (1986).

When hearing was held in 1985, the administrative law judge had the authority to adjudicate the issue of whether claimant had unreasonably refused to undergo medical treatment under Section 7(d)(4), as applicability of this Section is governed by Section 28(e)(2) of the 1984 Amendments. Dodd v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 245 (1989).

Section 8(i), as amended in 1984, applicability of which is governed by Section 28(b) of the Amendments, is applicable in cases involving post-amendment settlements. Nordahl v. Oceanic Butler, Inc., 20 BRBS 18 (1987), aff'd, 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988).

Amended Section 8(i) applies to pending claims and allows administrative law judges to approve lump-sum settlements. Downs v. Director, OWCP, 803 F.2d 193, 19 BRBS 36 (CRT)(5th Cir. 1986), aff'g Downs v. Texas Star Shipping Co. Inc., 18 BRBS 37 (1986).

The Board noted that Section 8(i) as amended in 1984 applies in a case involving settlement negotiations conducted subsequent to the effective date of the 1984 Amendments to the Act. Fuller v. Matson Terminals, 24 BRBS 252 (1991).

In a footnote, the Board notes that the amended version of Section 8(i) applies to claims filed after or pending on the 90th day after Sept. 28, 1984, and that the regulations implementing amended Section 8(i) were not promulgated until Jan. 1985. Thus, and alleged settlement submitted to the district director in Nov. 1984 could not have been evaluated under the new regulations. Henson v. Arcwel Corp., 27 BRBS 212 (1993).

#### Date-5

Section 9 as amended in 1984 is not applicable where the employee's death occurred prior to the effective date of the Amendments, pursuant to Section 28(d) of the Amendments. Swasey v. Willamette Iron & Steel Co., 20 BRBS 52 (1987).

In a case where decedent died in 1986 due to causes unrelated to his 1979 work injury, the Board affirms the denial of death benefits, as the 1984 Amendments eliminated recovery for non-work-related deaths. *Close v. International Terminal Operations*, 26 BRBS 21 (1992).

Where the case was pending before the administrative law judge when new Sections 10(i) and 10(d)(2)(B) became effective, these provisions should have been applied in the judge's average weekly wage calculation. MacLeod v. Bethlehem Steel Corp., 20 BRBS 234 (1988).

Section 10(f) as amended in 1984, limiting yearly adjustments to the lesser of the percentage increase in the national average weekly wage or five percent, applies prospectively to all adjustments to which a claimant is entitled beginning on October 1, 1984. Therefore, the administrative law judge erred in finding the amended provision inapplicable. Determinations of the effective date of Amendment provisions covered by Section 28(e) of the Amendments must be done on a case-by-case basis. Phillips v. Marine Concrete Structures, Inc., 21 BRBS 233 (1988), aff'd on other grounds, 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), vacated on other grounds, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(en banc).

Issues raised involving Sections 12 and 13 must be decided pursuant to the Act as amended in 1984 where the case was pending on appeal before the Board on the enactment date of the Amendments. Horton v. General Dynamics Corp., 20 BRBS 99 (1987).

Since Section 28(a) of the 1984 Amendments provides that the amendments to Sections 8(c)(13), 12, and 13 apply to claims pending on or filed after September 28, 1984, the Amendments were applicable to these claims for hearing loss filed in 1986. Manders v. Alabama Dry Dock & Shipbuilding Corp., 23 BRBS 19 (1989).

The statute clearly provides that the 1984 Amendments extending the statute of limitations for filing a hearing loss claim apply to claims filed after September 28, 1984 regardless of when the events underlying the claim occurred. Alabama Dry Dock & Shipbuilding Corp. v. Sowell, 933 F.2d 1561, 24 BRBS 229 (CRT) (11th Cir. 1991).

Date-6

Statutory sections covered by Section 28(e)(1) of the Amendments do not generally apply to cases pending on appeal before the Board on the date of enactment of the 1984 Amendments. However, they may apply to cases pending at the deputy commissioner or administrative law judge level at that time unless manifest injustice would result or there is statutory direction or legislative history to the contrary. Section 26(b), amending the allowable fines under Section 49 of the Act, may be applied to a case pending before the administrative law judge on the date of enactment of the Amendments. Powell v. Nacirema Operating Co., Inc., 19 BRBS 124 (1986).

Although the Board has stated in cases covered by Section 28(e) of the Amendments that if manifest injustice would result from application of an intervening law to a pending claim, so as to deprive a party of a substantive right absent notice, the law should not be applied, this rule does not apply to those amendments which are expressly made applicable to pending claims. The plain language of Section 28(a) of the Amendments mandates that the amended Section 12(a) time limitation for occupational diseases apply to all pending claims. Januszewicz v. Sun Shipbuilding and Dry Dock Co., 22 BRBS 376 (1989).

Pursuant to Section 28(e)(1) of the 1984 Amendments, the amended definition of wages at Section 2(13) of the Act applies, since claimant's injury occurred after the date of enactment of the Amendments. Lopez v. Southern Stevedores, 23 BRBS 295 (1990).

The court affirmed the Board's holding that provisions falling within Section 28(e)(1) of the Amendments do not apply to cases pending on appeal on the date of enactment. While amended Section 22 thus does not apply to pending claims, Section 22 modification must nonetheless be denied as modification was not available for Section 8(i) settlements even prior to the 1984 Amendments. Downs v. Director, OWCP, 803 F.2d 193, 19 BRBS 36 (CRT)(5th Cir. 1986), aff'g Downs v. Texas Star Shipping Co., Inc., 18 BRBS 37 (1986).

Amended Section 33(f) and (g) applies in cases pending before administrative law judges on the effective date of the 1984 Amendments. Pinell v. Patterson Service, 22 BRBS 61 (1989); Chavez v. Todd Shipyards Corp., 21 BRBS 272 (1988); Armand v. American Marine Corp., 21 BRBS 305 (1988).

While the 1984 Amendments to Section 33(g), which added Section 33(g)(2) to the Act, apply to pending claims, the Section 33(g)(2) notice requirement cannot be applied retroactively to settlements entered into prior to the enactment date of the Amendments. In any event, the notice requirement was satisfied as employer had notice of the settlements at the time of the hearing. O'Berry v. Jacksonville Shipyards, Inc., 21 BRBS 355 (1988), aff'd and modified, 22 BRBS 430 (1989); Blake v. Bethlehem Steel Corp., 21 BRBS 49 (1988).

#### Date-7

In a case in which the claimant entered into a third-party settlement prior to the effective date of the 1984 Amendments, the Board held that the 1984 Amendments to Section 33(g) must be applied to the claim based upon the clear intent of Congress that the amendment to Section 33(g) is to be applied to pending claims. Moreover, the Supreme Court's decision in *Cowart*, 505 U.S. 469, 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), must be applied to this case, for the reasons stated in *Kaye*, 28 BRBS 240 (1994). That claimant may have relied on the statute and case law in existence at the time of her settlement cannot alter the result given the law on retroactivity. *Monette v. Chevron USA, Inc.*, 29 BRBS 112 (1995) (*en banc*) (Brown, J., concurring), *aff'g on recon.* 25 BRBS 267 (1992).

Although claimant sustained an injury in 1977 and a jury verdict was rendered in the third-party claim in 1981, this case did not come before an administrative law judge until 1993. Because this case was pending either on or after the effective date of the 1984 Amendments, September 28, 1984, and because Congress specifically provided that the amendments shall be applicable to such claims, the Board agreed that the 1984 version of Section 33(g) is applicable to this case. *Pool v. General American Oil Co.*, 30 BRBS 183, 185 (1996) (Smith and Brown, JJ., dissenting on other grounds).

Pursuant to the holding in *Keener v. WMATA*, 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987), the 1984 Amendments do not apply to cases arising under the 1928 D.C. Workmen's Compensation Act. *Pryor v. James McHugh Construction Co.*, 27 BRBS 47 (1993); *Gardner v. Railco Multi Construction Co.*, 19 BRBS 238 (1987), *vacating* 18 BRBS 264 (1986), *vacated on other grounds*, 902 F.2d 71, 23 BRBS 69 (CRT) (D.C. Cir. 1990), decision after remand, 27 BRBS 266 (1993); Kulick v. Continental Baking Corp., 19 BRBS 115 (1986).

Since the 1984 Amendments do not apply to D.C. Act cases, reconsideration en banc pursuant to Section 21(b)(5) of the amended statute is not available in those cases. Higgins v. Hampshire Gardens Apartments, 19 BRBS 192 (1987). See also 20 C.F.R. §801.301(d).

Date-8